

Protest of	)	Date: March 30, 1992
	)	
ABSO-CLEAN PORTAWASH	)	
	)	
Solicitation No. 489990-92-A-Q140	)	P.S. Protest No. 92-06

### DECISION

Abso-Clean Portawash ("Abso-Clean") protests the terms, specifications and requirements of a vehicle washing agreement it and two other offerors were awarded.

Solicitation No. 489990-92-A-Q140 was issued by the Dallas, TX, Procurement Service Office on November 29, 1991, with an offer due date of December 13 to obtain vehicle washing services for the San Antonio, TX area, through the use of vehicle washing agreements.<sup>1/</sup> The solicitation listed five types of vehicles to be washed and their estimated number of washes during the expected two year term of the agreement.<sup>1/</sup> According to the solicitation, all services were to be provided at the San Antonio, TX vehicle maintenance facility ("VMF") at 10410 Perrin Beitel Road. Section B.1 of the solicitation gave the vehicle washing specifications:

Vehicles are to be washed in accordance with Section C, Delivery/Performance

<sup>1/</sup> Vehicle washing and polishing services are obtained in accordance with Handbook AS-707B, October 1989, entitled "Contracting for Vehicle Washing and Polishing Agreements." The handbook advises that such an agreement "is an ordering agreement entered into by the Postal Service and a supplier of these services. [The agreement] sets forth the terms and conditions upon which a binding contract may be entered into at a later date, through placement of an order." Handbook AS-707B, 1.1.

The Postal Service's procurement regulation, the Procurement Manual (PM), refers to contracting procedures for such services as "structured contracting." PM 8.6.1 a.

<sup>2/</sup> The vehicle types, quantities, and estimates were as follows:

<u>Vehicle</u>	<u>Quantity</u>	<u>Estimated</u>	<u>Washings</u>
1/4 ton Jeeps	50	2,808	
1/2 ton Long Life Vehicles		396	23,660
1 ton van		2	104
2 ton van		3	156
Van		1	104

Schedule. The offeror must furnish all labor, materials, and equipment. Vehicles must be thoroughly cleaned, interior and exterior, including the removal of all road films. Interiors may be vacuumed or hand washed. Seats must be wiped dry, and the remainder of the interior must be left free of accumulated water. All windows/windshield glass must be thoroughly cleaned and wiped free of streaks. The outside must be hand washed with soap or detergent and rinsed. Normal pressure washing WILL NOT remove road film. Vehicles must be hand/brush washed. No spray or power washing of interiors is permitted.

Section C.2 required the contractor to "agree to a schedule [for performance] with the COR [contracting officer's representative] prior to the start date." Section G.7 warned offerors that "[m]ore frequent washings than are shown in Section A, . . . may be required from time to time due to inclement weather or other reasons. The COR will contact the contractor to direct the additional washings as needed. The contractor will be paid for additional washings at the unit price stated in the contract." Section G.8 stated that the agreement would be "activated by placing individual orders against it" and that the Postal Service "is not obligated to issue orders under this agreement, nor does the Postal Service guarantee a minimum dollar amount during the term of th[is] agreement. A binding contract will come into effect, and the supplier will become a Postal Service contractor, only upon placement of an order."<sup>1/</sup>

Provision M.1 of the solicitation stated that the Postal Service "intends to award a contract to the responsible offeror(s) whose proposal(s) will be most advantageous to the Postal Service, considering cost or price and other factors specified elsewhere in this solicitation" and that only those offerors whose proposals represented the best overall value to the Postal Service would be selected. Best overall value was defined as including hours of service, of both the Postal Service facility and the offeror. Offerors were reminded that they had to be determined to be responsible contractors with an adequate facility or an adequately equipped mobile unit, trained personnel and adequate financial resources to receive award.

Offers were received from five companies. On December 16, the contracting officer executed awards of vehicle wash agreements with Ultra Wash of San Antonio, Abso-Clean, and J D & M Maintenance Service, Inc., whose offers were, respectively, lowest, second lowest, and third lowest. J D & M's agreement showed an estimated contract amount of \$65,886, while the agreements of Ultra Wash and Abso-Clean both reflected \$10,000 estimated amounts. Abso-Clean filed a timely protest with the contracting officer on December 30, which was denied by the contracting officer by letter dated January 9, 1992. The protester timely protested that denial to this office, where it was received on January 24.

In its protest, the protester states that based upon its previous contracts with the Postal Service, it assumed it was to perform vehicle washing services for all 452 vehicles, the bulk of which were LLVs, identified in the solicitation, and that it based its prices on the total quantity. Abso-Clean asserts that the solicitation did not state that the quantity

<sup>3/</sup> The clause continues by noting that "the terms 'contract' and 'contractor' as used in this as well as other sections, should be read as 'agreement' and 'prospective contractor', respectively, except in the context of the Postal Service order."

could be split among three contractors with the bulk of the award going to the highest priced awardee. Abso-Clean contends that award to J D & M at higher unit prices violates the "sealed bid process."<sup>4/</sup>

Abso-Clean further asserts that when it contacted the COR on this contract to discuss a washing schedule, it was informed that it should wash the tractors, trailers and seven-ton vans located at a postal facility other than the San Antonio VMF. The protester states that when it objected to this order, the COR told it to do the work and an amendment would be made later to its agreement. Abso-Clean contends that when it asked the COR why it was not awarded the entire requirement, it was informed that its prior contract performance had been unsatisfactory and that the new solicitation had higher quality standards than the previous ones. Abso-Clean asserts that the COR threatened to terminate its contract if it protested the situation.

Abso-Clean explains that it has been awarded seven or eight vehicle washing agreements previously and has never had one terminated. Based upon its prior performance, Abso-Clean believes it is a responsible contractor, contrary to the alleged assertions of the COR assigned to its current agreement.

The protester states that it also washed vehicles at another postal facility not listed in the solicitation and that even though it strictly followed the solicitation guidelines, it was informed that its quality of work was not totally acceptable. Abso-Clean asserts that this means that the specifications are vague. The protester believes that the change in requirements on this contract as compared to its previous contracts necessitated a pre-bid conference.<sup>5/</sup>

The contracting officer reports that she had received complaints about the protester's performance on past vehicle wash jobs and that those complaints may explain the COR's comments concerning Abso-Clean's responsibility. She states that she told the protester, after award, that this was an agreement, not a contract and that the quantities listed in the solicitation were an estimate of what the contract could entail. She states that she further explained to Abso-Clean that the Postal Service was not under any obligation to make any orders under the agreement, referencing Section

<sup>4/</sup> With minor exceptions, the Postal Service no longer conducts "sealed bid" procurements. Instead, it uses negotiated procurement procedures. In negotiated procurements, the lowest priced offeror need not necessarily receive the award. Instead, the Postal Service may look at other evaluation factors and may negotiate with offerors prior to award. See PM 4.1.4.; 4.1.5 b. (a "contract will be awarded to the offeror whose proposal offers the best value to the Postal Service, considering the price, price-related and other evaluation factors identified in the solicitation").

<sup>5/</sup> Preproposal conferences are never mandatory. Procurement Manual ("PM") 4.1.2 h.1. advises that "[w]hen circumstances suggest that it would be useful, such as when a solicitation has complicated specifications or requirements, a preproposal conference may be held to brief prospective offerors." We note that the solicitation did contain a provision by which prospective offerors could request information in writing, and that Abso-Clean apparently did not avail itself of that opportunity.

In any event, Abso-Clean's contentions that the specifications were defective or that a preproposal conference should have been held constitute protests against alleged deficiencies in the solicitation, and are untimely raised at any time subsequent to the date set for the receipt of offers. PM 4.5.4 b.

G.8. The contracting officer also points to Section M.1, asserting that the language in that section clearly contemplates multiple awards.

The contracting officer states that Abso-Clean was asked for a price to wash other vehicles at other locations and informed that its agreement would be modified accordingly. She reports that the requirements had not changed from past agreements but that greater compliance with the specifications was being sought. She notes that the solicitation's specifications came from Handbook AS-707B. The contracting officer reports that Abso-Clean stated that it could not perform the stated requirements at its offered price. The contracting officer states that the COR never conveyed to her that he wished to terminate the protester's agreement. She adds that the agreement allows either party to terminate with 30 days' notice. Finally, the contracting officer reports that the specifications were not changed after award and that the COR's enforcement of the specifications was not unreasonable.

The protester responds to the contracting officer's statement. It argues that it never received notice of any complaints about its performance and if it had, it could have taken corrective measures. Although Abso-Clean admits that multiple awards may have been allowed, it states that a multiple award has never before been made for vehicle washing agreements in that area since 1977, when it began submitting offers. Abso-Clean explains that previously, when an area needed more than one contractor, two solicitations were issued. The protester attributes this use of multiple awards to improper motives on the part of the COR, so as to give an award to J D & M.

Abso-Clean explains that it told the COR that it could not perform at its stated price requirements that it asserts were not included in the initial solicitation, such as orders to wash the interior walls, ceilings and tops of the LLVs. The protester questions whether it is a violation of the procurement regulations for the COR to threaten to terminate its contract, even if the COR did not convey this threat to the contracting officer.

## Discussion

We address Abso-Clean's concerns individually. The protester contends that the solicitation did not inform offerors that multiple awards could be made. The solicitation adequately informed offerors of the possibility of multiple awards. Section M.1 of the solicitation, entitled "Basis of Award," stated that "[t]he Postal Service intends to award a contract to the responsible offeror(s) whose proposal(s) will be most advantageous to the Postal Service . . . . Each offeror is advised that the Postal Service will enter into contracts with only the offeror(s) whose proposal(s) represents the best overall value to the Postal Service." While this advice could have been clearer,<sup>6/</sup> its use of plurals and conditional plurals "(s)" should have given the prospective offerors an adequate indication of the possibility that multiple agreements might result from the solicitation.

<sup>6/</sup> For complete consistency with the scheme of the solicitation, and the possibility of multiple agreements, the references to "award of contract" and "enter into contracts" should have been "enter into agreement(s)." As noted at footnote 3,<sup>supra</sup>, the terms "contract(s)" and "contracts" should be read as "agreement(s)" and "agreements."

The fact that in previous instances multiple agreements were not entered into is not dispositive.

Another issue raised by the protester was the propriety of the Postal Service asking Abso-Clean to wash vehicles at a location other than that listed in the vehicle washing agreement. This is a matter outside our protest jurisdiction, which, pursuant to PM 4.5.2, extends only to the "written objection by any interested party concerning the terms of a solicitation, the award or proposed award of a it contract, or any other action relating to the solicitation or award of a contract."

Orders that services be performed which a contractor bdieves is outside the terms of the contract does not involve the solicitation or its terms or the award of a contract. Instead, it concerns contract administration and is more suitably addressed pursuant to the terms of the agreement. As is noted above, the agreement is not a contract, but becomes a contract to the extent that orders placed against the agreement by the Postal Service are accepted for performance by the contractor. If Abso-Clean does not wish to perform the services covered by the orders, it need not accept them. Alternatively, should it choose to accept them, the COR's directions to perform the work at a different location would constitute a change within the scope of the Changes clause of the agreement, H.3, for which the contractor could submit a claim for an equitable adjustment. This portion of the protest is dismissed. See M.L. Halle Oil Service, Inc., P.S. Protest No. 85-76, November 26, 1985.

Another issue which the protester presents has to do with its perception that it has been disadvantaged in the course of this procurement because the Postal Service believes that its prior performance was somehow unsatisfactory. Initially, we note that the fact that Abso-Clean was awarded a vehicle washing agreement establishes that the contracting officer found to be a responsible prospective contractor.<sup>1/</sup>

As set out above, the solicitation made it clear that award would be made only to responsible firms. The question actually presented here is whether it was appropriate for the contracting officer to reduce the estimated amount of Abso-Clean's agreement as the result of the Postal Service's concerns about its ability to perform which were not so great as to establish that Abso-Clean was nonresponsible. Under the terms of this solicitation and the regulations applicable to it, the answer to that question must be "no."

While the solicitation and Handbook AS-707B allow multiple agreements, the Handbook's direction concerning the placement of orders when there are multiple agreements is specific: "If more than one [vehicle washing agreement] has been awarded, orders should be placed with the supplier that quoted the lowest unit price for the service needed. If that supplier cannot provide timely service, the order should be placed with the supplier quoting the next lowest price . . . ." Handbook AS-707B ' 4.2.2. The evaluation factors set out in the solicitation similarly provide no basis for the consideration of issues of performance in the determination of awards. As discussed

<sup>1/</sup> The evaluation of prior poor performance is one of the general standards that a contracting officer must assess in determining whether a prospective contractor is responsible. PM 3.3.1 b.3. We express no opinion concerning the correctness of the determination of responsibility.

above, proposals were to be evaluated on the basis of advantage to the Postal Service, taking into account cost or price and other specified factors. The only specified factors were the supplier's responsibility and its hours of service with relationship to the Postal Service's hours. Abso-Clean was found to be responsible, and there is nothing in the protest file to suggest any reason that its hours of service affected its evaluation.

Accordingly, the agreements awarded pursuant to this solicitation should be administered in accordance with the handbook (that is, by placing orders first with the lowest-priced offeror, Ultra-Wash, and with the higher-priced offerors, Abso-Clean and J D & M sequentially only to the extent necessary to satisfy the Postal Service's needs).

If administration of the agreements on those terms will not meet the Postal Service's actual requirements, the agreements should be terminated on notice in accordance with their terms, and new agreements should be sought on revised terms which correctly state those requirements.<sup>4/</sup>

The protest is dismissed in part and sustained in part to the extent indicated.

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<sup>8/</sup> For example, the solicitation allowed either vacuuming or hand-washing of vehicle interiors. If it is determined that hand washing of interiors is required, as Abso-Clean was directed to do, the solicitation should so indicate. Similarly, if it is determined that it is appropriate to consider matters of performance in ranking the offers of responsible offerors, the evaluation criteria should be revised accordingly.